No. 9111

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JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

No. 16104

WILLIAM BIRDWELL, *et al.*,

Appellants,

v.

J. M. KIRKLAND, *et al.*,

Appellees.

WILLIAM BIRDWELL, *et al.*,

Appellants,

v.

AMERICAN BONDING COMPANY OF BALTIMORE, *et al.*,

Appellees.

Appeals from the Court of Civil Appeals of Texas for the Second Supreme Judicial District at Fort Worth

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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BRIEF IN OPPOSITION TO MOTION TO DISMISS

1. APPELLEES DO NOT DEFEND THE HOLDING OF THE STATE COURT

Significantly, the motion or brief does not reflect any effort to defend the basis upon which the Court of Civil Appeals at Fort Worth, Texas, decided the case in favor of

the appellees. The motion or brief does not even contain a reference thereto, citing cases upholding the Court of Civil Appeals, showing a valid defense. Obviously appellees recognize that it is indefensible.

It is shown in the first 6 questions of appellants' Statement as to Jurisdiction wherein that there was an unlawful and illegal and invalid removal order and proceedings from Bell County, Texas, to Young County, Texas; and when the guardian attempted to convey the land in question it had already been conveyed and neither the probate court nor the guardian had jurisdiction of the same, and that the guardian's deed was made in confirmation and ratification of the former deed of August 1, 1913, and that when the guardian purported to sell said land he was benefitted directly and indirectly from the sale of same, and that the attempted sale by the guardian was made without any consideration paid then nor any time thereafter, showing a total failure of consideration of the entire purchase price, and that the bonding companies, appellees herein, were liable on their bonds on the ground that all of the proceedings, orders and judgments of the Probate Court of Young County, Texas, were void, and estopped the bonding companies from questioning the jurisdiction of court and the invalidity of the record. Thus we see the appellants have shown that all the above and foregoing proceedings in the Probate Court of Young County, Texas, were all void and subject to collateral attack, which rendered the surety companies liable, and the orders purporting to release the surety companies were void, and not subject to the limitation stat-

utes, and in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

Furthermore, in view of all of the void and invalid proceedings set up by the appellants, the appellees have not denied, nor sought to explain the same, nor have they challenged the law and facts containing the same, but by their silence have impliedly shown that the law and facts are against them.

On page 2 of appellees' brief the appellants challenge the following statement: "In these suits Appellants seek to recover title to the land sold by their guardian in 1913 and also to recover from the sureties for alleged defalcations by the guardian." In answer to same appellants have made an election of their remedies on the recovery on the mineral interest and the land, *15 Tex. Jur. p. 823, Sec. 4,* and if they have not the right to recover on same, then in the alternative, they ask the court for a recovery on the bonds. Appellants are asking this Honorable Court to give appellants the right to recover on either as according to their choice and to recover the costs adjudged against them on the bonds by the Court of Civil Appeals.

At the top of page 4 of appellees' brief, being second paragraph from top wherein appellees state: "The effect of the state court decision is simply that the statute (Art. 5528) was inapplicable" as to the suit on the bonds, but upon the examination of the decisions of our courts we find that you cannot recover for the defalcation of the guardian by and through a bill of review; it must be brought under

Article 5528 of the R. C. S. of 1925 of the State of Texas, and that you cannot bring a suit to recover on the bonds under *Article 5529*. It is held in *21 Tex. Jur. p. 364, Sec. 103 (old series)*.

> "Inasmuch as the court on bill of review has * * * no authority to decree the final partition and distribution of the estate of a deceased ward, *nor to render a judgment which has the effect of holding the guardian liable as for a devastavit.*" *Nicholson v. Nicholson, 125 S. W. 965, error refused; Francis v. Northcote, 6 Tex. 186.*

QUESTION 10 (FUNDAMENTAL ERROR)

Whether at the time of the sale of the land of the wards in question by the guardian through the Probate Court of Young County, Texas, the appellees set up on pages 15 and 16 of their brief that the statute now Art. 4201 required the guardian to file a good and sufficient bond in twice the amount of the land sold, since this was not done, the bonding companies are not liable, and appellants say it rendered the judgment void and the same is a fundamental error not assigned, and in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

The appellees on said pages of their brief, state, "The bond on which American Bonding Company of Baltimore is surety is a general guardian's bond, unrelated to the sale of real estate (S. F. 23). The same is true of the bond on which the American Surety Company of New York is surety (S. F. 47, 48). In the trial court Petitioners contended that the latter bond was a guardian's sale bond rather than a gen-

eral bond, but such is clearly not the case. At that time there was in effect a statute (now Article 4201) which provided that the order of sale of real estate should require the guardian to file a good and sufficient bond * * * in twice the amount for which the real estate sold. * * * The real estate in question was sold for Two Thousand Dollars ($2,000.00), which means that a guardian's sale bond would have had to be in at least the amount of Four Thousand Dollars ($4,000.00)."

And on page 12 of appellants' Second Amended Original petition in cause No. 13468, they set up in paragraph 9 approximately what the appellees stated above, and added:

> "Said real estate sold for $2,000.00. Therefore the said sale was erroneous, for the same was not twice the value of the property, and said order is void and should be set aside. That said statute is mandatory and the order is void from the face of the record."

The appellants herein have ignored the nullity of said judgment, although they have plead the same, but have failed to set it up, thinking that they had already set up enough invalid orders to set aside said judgment, in this particular phase of the case, but since the appellees are trying to take the advantage of said invalid orders, appellants thought they had better set it up. The courts hold in 45 *Tex. Jur. p. 686, Section 252:*

> "* * * If a judgment is in fact a mere nullity there is no reason why it should not be declared so whenever the occasion arises. While a void judgment may be attacked directly as well as collaterally, there is no necessity for doing so; it need not be vacated or set aside; it may be simply ignored. And when some right

is asserted under the judgment, its invalidity may be pointed out by anyone in any kind of proceeding, *in any court, and at any time*. In other words, it may be attacked collaterally."

In the case of *Woods v. Sloan*, 9 S. W. 2d 485, holds:

"Order granting guardian's application for leave to sell ward's real estate, not requiring the guardian to give bond for twice the amount for which the land sold, as required by Rev. St. 1925, Art. 4201, a mandatory statute for protection of substantial property rights of the ward, and the guardian's report of sale not showing that such bond was given, as in fact it was not, such order and the order confirming the sale are void, and may be collaterally attacked";

and further holding the judgment is void for want of jurisdiction and power to grant the relief contained in the judgment; *Cline v. Niblo*, 8 S. W. 2d 633.

In *United States v. Walker*, 109 U. S. 258, 3 S. Ct. 277, 27 L. Ed. 927, the court held:

"Although a court may have jurisdiction over the parties and subject-matter, yet if it makes a decree which is not within the powers granted to it by the law of its origination, its decree is void."

To the same ruling is the case of *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914.

In the case of *Simpson v. Booth*, 163 S. W. 2d 1080 and 1986, the court holds:

"The probate and not the district court shall determine the necessity for the sale, direct the sale and the terms thereof; confirm the guardian's report of sale; and order the guardian to make deed to the purchaser in pursuance thereto; and that, too, only upon the

guardian giving bond in an amount equal to double the value of the personal property then on hand and the amount for which said real estate may be sold. These provisions of the statute are by the Legislature made mandatory, and unless followed, the sale of a ward's real estate is declared by the statute to be void"; and further holding: "And the guardian of the ward may not ratify or confirm the void proceedings affecting the title, and the invalidity thereof may not be waived by any acts, omission or commission, of the guardian."

In the Probate Court of Young County, Texas, in the sale of said land by the guardian where the bond was not twice the value of the real estate sold, the statute being mandatory, and the order of sale and judgment confirming the sale are void for want of jurisdiction and power to grant the relief contained in the judgment, and the same is a fundamental error, without being assigned, and can be taken advantage of at any time and in any court, and said void judgment is in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

ERROR FUNDAMENTAL

In *3 Tex. Jur. 2d p. 462, Secs. 188 and 189*, the Courts hold:

"Fundamental errors need not be assigned as error in order to be considered by an appellate court. In fact, an appellate court will take judicial notice of such errors. And it is said that the court has a duty to consider such errors without an assignment.

"In another case, the court stated that where the record affirmatively and conclusively shows that the

court rendering the judgment was without jurisdiction of the subject matter, the error will be regarded as fundamental." *Murray v. Brisco, 209 S. W. 2d 976; Smith v. Basham, 227 S. W. 853; Glenn v. Armstrong, 284 S. W. 2d 165.*

"In Thompson v. Whitmore, 18 Wall. 457, 21 L. Ed. 897, and National Exchange Bank of Tiffin v. Wiley, 195 U. S. 257, 49 L. Ed. 184, both cited with approval in Marin v. Augadahl, 247 U. S. 142, 62 L. Ed. 1038-1043, it was held that a judgment may be attacked collaterally as void for lack of jurisdiction of the subject matter or the person of the defendant, even when the judgment recites findings of jurisdictional facts such as service of summons upon the defendant. Which is in keeping with the guaranty of due process of law by both the Federal and State Constitutions * * *; and also in accord with the general rule that a void judgment is incapable of conferring any rights at any time";

and same is not due process of law.

However, it is further shown that void judgments are not due process of law as shown in *12 C. J. p. 1238, sec. 1012*, holding:

"Judgments are void, however, for want of due process where rendered without jurisdiction, * * * or without any judicial determination of the facts which alone can support it."

The said surety companies on pages 15, 16 and 17 of their brief are seeking to evade liability on the ground of the invalidity of the guardianship proceedings, in that on the 16th day of August, 1913, the American Surety Company of New York entered into a bond approved by the court in the sum of $2500.00 in order to sell the wards' real estate, and on the same day, August 16, 1913, the guardian

executed an affidavit to his application to sell the wards' real property, and was filed 11 days thereafter, which said appellees contend that it was not a sales bond but a general bond and therefore not liable on same according to law; and they further set up the invalidity of the guardianship proceedings because the bond of said surety company was not twice the value of the real estate sold and was therefore not a statutory bond but a general bond and not liable on same.

The said appellees, the insurance companies are not permitted to defend on the ground of alleged invalidity of the guardianship proceedings, and thereby escape liability for the misappropriation of funds which came into the hands of the guardian by the proceedings where the bonds were executed by the surety companies, and are estopped to deny their liability.

In the case of *Abilene State Bank v. United States Fidelity & Guaranty Company, 37 S. W. 2d 815*, it is shown in that case that the two guardians took out a guardianship on a non compos mentis at different times and the guardians entered into a bond each in order to get possession of the ward's money. After the defalcation of one of the guardians the surety company set up the fact that the two guardianships were void and the court so held for the ward had never been adjudged insane and the court never had jurisdiction.

The court held:

> "Had Garrison sued the guardian, Stanage, and the surety company for the $178.51 converted by said guardian, they would not be heard to defend on the

ground of alleged invalidity of the guardianship proceedings, and thereby escape liability for the misappropriation of the funds which came into the hands of the guardian under and by virtue of said proceedings, and the bond executed by the surety company."

Gann v. Kern, 249 S. W. 878, also holding principal and sureties estopped to the recitals in the bond; *Minchew v. Case, 143 S. W. 366.*

In addition to the above authorities, even if the second bond was a general bond as contended for by said appellees, the American Surety Company of New York is liable on it in the sale of said real estate for it was executed conditioned for the faithful performance of the duties of guardian of the estate according to law, and at the time the bond was executed on August 16, 1913, and was on the same day that the application for the sale of the real estate was executed and sworn to by the guardian to sell the land, and the same should be construed together, and it was in contemplation of all parties to sell the land, and one of the duties of the guardian was to sell the land; therefore, it is held in *American Indemnity Company v. Noble, Com. of App., 235 S. W. 867 and 869:*

> "Again, if the statute requires the guardian to execute a bond conditioned for the faithful performance of the duties of guardian of the estate according to law, and one of the statutory duties is the sale of real estate, and it is made the duty of the court in connection with the sale to exercise its discretion in exacting further or additional bond, the sureties on the general bond is liable. The special bond in such instance is but cumulative security to that of the general bond. Both bonds are for the same purpose." *21 Tex. Jur. (Rev.) p. 352, Sec. 374.*

Furthermore, the appellees, the surety companies contend that the last bond when the guardian sold the land was not a sales bond nor a statutory bond and are not liable on same; but the said sureties on the bond are liable, having voluntarily made it; it being good as a common law obligation.

It is held in *Moore v. Hanscomb, 103 S. W. 665 and 672*:

> "It does not follow because the bond given by the Guaranty Company was not authorized as a statutory bond that it is not liable for the default of the guardian occurring after it had voluntarily given a bond for the faithful performance of the guardian's duties. 'Even a voluntary bond, if not in contravention of public policy or statutory law, is binding on the makers; hence a bond given for the performance of a trust reposed, whether public or private, is valid, and, though inoperative as a statutory guardian's bond will be good as a common law bond'." *Bopp v. Hanford, 45 S. W. 744; Jones v. Hays, 27 Tex. 1; Jacobs v. Daugherty, 15 S. W. 160; Bank v. Lester, Supreme Court, 11 S. W. 626.*

It is further contended on page 18 of appellees' brief that the American Bonding Company was discharged from further liability on its bond by order of the County Court of [illegible] County on February 8, 1910 (S. F. 38). The appellants challenge such statement, and on examination of said order we see that the court never did release the said surety, but ordered him to make a new bond, which was not complied with until after the defalcation of the guardian on August 1, 1913, when the guardian profited from the sale of said land, taking $400.00 in trade for 2 horses and $112.50 in

cash and appropriated the same to his own use and benefit and after that on August 16, 1913 the guardian made a new bond, which rendered the American Bonding Company liable on said bond in the sum of $512.50 before a new surety qualified, which was sworn to by appellants in summary judgment and not denied by appellees. In the case of *New Liberty Com. School v. Merchants & Planters' Bank, 273 S. W. 330* the court held:

> "It was held that the filing of a new bond before the expiration of such time had the effect of releasing the sureties on the first bond, provided the conditions of the first bond had not been breached before the second was filed." *39 Tex. Jur. 922.*

Also, we find that when the Probate Court attempted to release the American Surety of New York on the 13th day of July, 1915, the guardian had already appropriated $400.00 worth of notes to his own use and benefit and under the same rule rendered the said surety company liable, and since said guardian never did make a new bond as ordered by the court in attempting to release said surety company, the said surety company was liable on the third note in the sum of $287.50, totalling in all $687.50 with interest added, which was sworn to by the appellants and never denied by appellees.

It appears as shown above that after the attempted release of said sureties, the court ordered the guardian to make a new bond, which was not complied with, which renders the sureties liable when the guardian disobeys a valid

order of the probate court. In *21 Tex. Jur. p. 396, Sec. 122*, it is shown:

> "Again, it appears that a breach results whenever the guardian disobeys a valid order of the probate court.
>
> "In Fahey v. Boulmay, 59 S. W. 300, the court ordered the guardian to pay over to a deceased ward's mother a portion of the estate. It was held that, upon his failure to do so, the mother had a right of action on the bond."
>
> Also, "In Ramsey v. Crow, 3 S. W. 2d 486 * * *, it appeared that the guardian had placed money in a bank. The court ordered him to withdraw it. He violated the order and the money was lost through failure of the bank. It was held that he and the bondsmen were liable".

On pages 11, 12 and 13 of appellees' brief, they seek to escape liability on the ground that appellants failed to bring suit within 4 years after they reached their majority in order to set aside the order purporting to release the American Surety Company of New York from all liability, and further set up the fact that said order of release is not subject to collateral attack. They cite many cases to support their contention, among them are *Parmley v. Parmley*, *Morse v. Morse*, *Miller v. Miller* and *Moore v. Hanscom*. Upon examination of all of these cases, we see that they are not in point for the reason that in those cases the court had jurisdiction over the parties, subject matter, and the court did not transcend its powers, and therefore not subject to collateral attack; and if the bill of reviews was not brought

in 4 years from same the orders could not be set aside, and barred by the statute of limitation.

In the case at bar, it is unlike all of those cases cited by appellees which is shown in the first 6 questions in Statement as to Jurisdiction and question 10 as shown herein. In all of those questions cited by appellants, the court never had jurisdiction which rendered all of the proceedings, orders, and judgments in the probate court void, including the purported orders relieving the surety companies from all liability, and such proceedings, orders and judgments were subject to collateral attack, and the 4 years statute of limitation did not apply to their bill of review.

On pages 19, 20 and 21 of appellees' brief they set up the fact that the appellants brought their suit in the Probate Court of Young County, Texas, on the bonds in excess of $1000.00 in order to recover on the same, which was beyond the probate court's jurisdiction. The appellants challenge that statement, the suit was brought in the probate court as a direct and a collateral attack in order to determine the liability of the sureties and to set aside the invalid and void orders also to determine the liability of the owners of the land. The appellants never asked for judgment on the bonds in the probate court, but only asked for an accounting, which was abandoned by them. Appellants brought suit in the District Court in trespass to try title to recover on the mineral rights and land, and in the alternative on the bonds. The suit on the bonds were set up on page 4 of appellants' second amended original petition in the District Court of

Young County, Texas, and filed less than 4 years after the guardian's discharge in death.

ALLOWANCE ORDER

The appellees claim on page 21 of their brief that the guardian applied to the probate court of Bell County, Texas for an order for the support and maintenance and education of said wards in the sum of $100.00 each per year, and such allowance was granted on the 10th day of January, 1910, and never revoked, it precludes the recovery of the appellants on the bonds. They further state that the guardian was the sole surviving parent of said minors, and through financial losses and ill health is unable to properly maintain and educate the said minors without using a portion of said estate.

However, it appears that he must have regained his health soon thereafter, and married Mollie Birdwell for she joined him in making a deed to J. M. Kirkland on August 1, 1913 of the wards' real estate; and on April 11, 1911 in his application for the removal of the guardianship from Bell County, Texas, he states:

> "That he is still keeping and maintaining said minors and is able, ready and willing to continue to provide for the education, maintenance and support of said minors."

This order of the court is interlocutory, not appealable and is based on the happening of some future contingency

and not a final order. The order here sought to be appealed from by its own terms is to become effective only in the event that the guardian applies the proceeds of the sale of said land to the support and education of the said minor wards, the appellants herein, and follow the statute and orders of the court, to which the guardian did not do. It is held in *3 Tex. Jur. 2d p. 344, Sec. 79:*

> "A judgment is not final and appealable where it leaves a question open for future determination or where proceedings and action of the court are necessary to complete relief, as where the court expressly retains the cause of the docket and holds the judgment open for the disposition of certain reserved matters, or where the judgment becomes effective only on the happening of some future event or contingency."

It is also held in *33 C. J. p. 1196, Sec. 129:*

> "It is a general rule that judgments must not be conditioned upon any contingency, and it must be held that an alternative or conditional judgment is wholly void." *Dodd v. Daniel, 89 S. W. 2d 495.*

Since the guardian was suspended under Article 3398 from April 4, 1910 to August 16, 1913, when the American Surety Company made a new bond a period of about 3 years, 4 months and 12 days, from which time he was prohibited from spending anything out of the estate of the minors. That since said minor, Lee Birdwell, married on the 9th day of February, and her husband took care of her from then on, and since the guardian made a bond on the 16th day of August, 1913, a period of about 5 months and

23 days, which was the only time that the guardian was permitted to pay her anything under the law, if he did pay; but she says that he did not pay her anything out of the estate nor did anybody else. And since the American Surety Company of New York asked to be released on the 15th day of July, 1915, and the guardian was ordered to make a new bond, which he refused to do, and was suspended again. The whole time the guardian was not suspended and could have paid the ward, William Birdwell, was a period of about 1 year and 11 months, but the ward, William Birdwell says that he did not pay him anything out of the estate, nor did anybody else.

According to record, the guardian never did file an annual account, or file any kind of an account showing that he paid the wards anything, nor did he ever file a final account. Under *Article 4253*, the guardian failed to file his claim which he held, if any, against the wards, at the time of his appointment, or which has since accrued, verified by his affidavit. Since the guardian did not do that, he is not entitled to credits, if he did make expenditures for the maintenance of said wards, for it is held in *Yates v. Watson, Com. App., 221 S. W. 966:*

> "One supplying necessaries, as maintenance and education, for a minor, must present his claim for amount so expended to probate court, and have it allowed and approved, and if he fails he is not entitled on final accounting as guardian, to credits for such expenditures."

Appellants respectfully submit that the Motion to Dismiss should be denied and the cases heard on briefs and oral Argument.

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CERTIFICATE OF SERVICE

I, Sidney E, Dawson, one of the attorneys for Appellants and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ' day of June, 1961, I served copies of the foregoing brief on the following attorneys of record for Appellees, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

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